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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
)
Competitive Bidding for) MM Docket No. 97-234
Commercial Broadcast Service Licenses)

To: The Commission

COMMENTS OF THOMAS DESMOND

Thomas Desmond, by his counsel, hereby respectfully submits his comments in the instant Notice of Proposed Rulemaking ("NPRM") relating to competitive bidding for commercial broadcast service licenses.

I. BACKGROUND

1. The FCC has solicited comments in regards to the NPRM. As an individual who has petitioned the FCC to amend the FM Table of Allotments to provide new services, and who has applied for a construction permit to build an FM radio station, Mr. Desmond wishes to comment on various topics the NPRM raises. As one who intends to petition for and to apply for new FM allotments in the future, the outcome of this rulemaking will directly affect Mr. Desmond.

2. Mr. Desmond's principal concern in this rulemaking is that the resultant auction procedures provide reasonable access to broadcast spectrum for those who currently do not own broadcast stations, or who own just one or a few stations. The

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Commission has, with ample justification, long held diversification of media ownership to be the most important selection criterion when two or more applicants contend for a vacant frequency. There is no reason to abandon the diversification criterion now. The Commission can best preserve diversification as a selection factor, while implementing Congress's will that the FCC auction contested vacant spectrum, by:

A. in the first instance shielding applicants from competing filings under narrowly tailored circumstances; and

B. according bidding credits to applicants that meet certain diversification criteria.

II. Proposals to Promote Diversity of Ownership

A. Shielding Rule-Making Petitioners

3. At the outset, Mr. Desmond deems it particularly noteworthy that § 309(j)(1) of the Act, as amended, mandates auctions *only* in those instances where “mutually exclusive applications *are accepted* [emphasis added].” It is well settled that the FCC has discretion in deciding under what circumstances it will accept and comparatively consider competing applications for vacant spectrum. See, e.g.,

- AM Improvement Order, 6 FCC Rcd 6273 (1991), recons. in part, 8 FCC Rcd 3250 (1993), wherein the FCC allowed existing licensees to migrate to new AM Broadcast spectrum without facing competing applications;
- Advanced Television Systems, MM Docket 87-268, wherein the FCC allowed existing licensees to migrate to new TV Broadcast spectrum without facing competing applications;
- Cellular Telephone Service, 89 FCC 2d 469 (1981), wherein the Commission allowed wireline telephone service providers to commence wireless (Cellular) service without facing competing applications; and

- Memorandum Opinion, Order and Authorization, 4 FCC Rcd 6041 (1989); Final Decision on Remand, 7 FCC Rcd 266 (1992); aff'd sub nom. Aeronautical Radio, Inc. v. FCC, 983 F.2d 275 (D.C. Cir. 1993), wherein the FCC awarded L-Band spectrum while rejecting claims to right to a comparative hearing.

Clearly, the Commission's own precedent allows, and Ashbacker¹ does not forbid, the grant of authorizations for new broadcast facilities without allowing for competing filings.

The Agency should do just that under the following circumstances for FM applicants:

A. The applicant:

- (i) either is the person or entity; or
- (ii) is controlled by the person or entity; or
- (iii) is under common control with the entity,

that petitioned the FCC for the allotment in question.

B. The applicant proposes a facility whose primary service contour does not overlap that of any other commonly owned or controlled AM, FM, TV, or LPTV broadcast station.

C. In the event that the application (as well as any other pending application) is granted, the applicant will not have an attributable interest more than five broadcast stations (combined tally for AM, FM, TV, and LPTV).

D. As an exhibit to its application, the applicant must supply an executed antitrafficking commitment outlined elsewhere in this document.

4. In the event that the conditions outlined in subparagraphs A through D above are met, the Commission will allow the Petitioner (or an entity controlled by or under common control with the Petitioner) to file, within 90 days after the effective date of the new allotment, to apply for a construction permit for a facility to occupy the new allotment. During this period, the Commission shall not accept for filing any applications

¹Ashbacker v. FCC, 326 U.S. 327 (1945).

from entities other than, or not controlled by, or not under common control with, the original Petitioner. If the Petitioner, or an entity controlled by, or an entity under common control with the Petitioner, files a tenderable application within the 90-day period, the FCC will process the application. If the FCC ultimately finds that application to be acceptable for filing and grantable, the FCC will grant the application. If the Petitioner, or an entity controlled by, or under common control with the Petitioner, does not apply during the 90-day period, the channel will become available to any and all other parties during a Commission-prescribed filing window.

5. There are several benefits to such an approach. First and foremost, it would promote diversity of ownership by granting preferential treatment to applicants with no or minimal other broadcast interests. Second, it would promote spectral efficiency by encouraging parties to seek out and petition for the allotment of new FM channels. And third, both expedited service to the public and administrative efficiencies would accrue.

6. To prevent abuse of the above-proposed process, Mr. Desmond recommends that applicants be required to execute and conform to an antitrafficking statement acknowledging that they understand and agree that the construction permit will be granted with the following conditions:

A. The applicant will not be allowed, via a long-form application, to assign or transfer control of the unbuilt construction permit. In the event that the station cannot be built for any reason, the applicant will be expected to return the construction permit to the FCC, which will then auction the allotment.

B. The applicant will not be allowed, via a long-form application, to assign or transfer control of, the station for an amount in excess of the applicant's expenses for a period of two years from the commencement of program tests.

C. If the applicant sells the station after this two year period, the applicant will be required to rebate to the U.S. Treasury a percentage of the sale price in excess of the applicant's acquisition and construction expenses as follows:

Year 3 80%
Year 4 60%
Year 5 40%
Year 6 20%

D. After six years, the applicant will be free to sell the station without any reimbursement obligation to the U.S. Treasury.

7. Mr. Desmond believes that a process similar to the one outlined in paragraphs 3 through 5 may also be appropriate for applicants for other broadcast services (AM, TV, and LPTV).

8. The Commission should also continue to foster diversity of ownership in instances other than those in which the process outlined in paragraphs 3 and 4 applies through the use of bidding credits. The NPRM itself raises the possibility of preferences for small businesses and minority applicants in the auction process. As the FCC therein correctly notes, in auctions, "...group owners may, as a result of economies of scale, have a significant advantage over newcomers not owning any broadcast stations." In the absence of bidding credits to even the playing field, this incumbents' advantage may prove an insurmountable obstacle to newcomers. As a result, Mr. Desmond strongly supports the availability of bidding credits for qualified applicants in situations where the FCC accepts competing applications.

9. Mr. Desmond believes that the FCC should grant a large credit to those applicants who own no other broadcast stations, and a smaller credit to small group owners (fewer than 20 combined AM, FM, TV, or LPTV stations), provided the latter do

not own any stations whose primary service contours would overlap that of the proposed facility. The reasonable likelihood that a small group owner would benefit less from economies of scale and availability of capital than a larger group justifies the latter preference.

10. To maximize the flexibility and value of the bidding credits, Mr. Desmond suggests that the applicant be allowed to employ the credit as either a flat dollar amount or as a percentage of the total bid. Mr. Desmond proposes the following bidding credits as reasonable to promote diversification:

no other stations	\$75,000 or 38%, whichever is larger
small group	\$37,500 or 19%, whichever is larger

To prevent inflation from eroding the value of the flat dollar credits, these amounts should be adjusted annually for inflation according to the Consumer Price Index.

11. The above proposals are sufficient to promote diversity of station ownership. Therefore, credits for women and minorities are unnecessary. Moreover, adopting female and minority credits in this proceeding is simply asking for trouble. Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995), teaches that the Constitution prohibits such favoritism, at least with regard to race and by extrapolation with regard to gender, unless they can pass muster under the “strict scrutiny” standard. They “... are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” Therefore, absent direct evidence of discrimination against women and minority applicants whose past efforts toward entrée into broadcast ownership have met with affirmative discrimination, such preferences are constitutionally

suspect. They are also likely to result in court challenges that will delay implementation of broadcast license auctions by years.

12. It is also worth noting that since few stations are currently owned by minorities, minority applicants are likely to substantially benefit from the ideas proposed herein. As a result, these proposals would enhance minority ownership of broadcast stations without spawning the inevitable, protracted legal challenges that direct racial and gender preferences would generate.

III. OTHER ISSUES RAISED BY THE NPRM

A. DETERRING UNJUST ENRICHMENT

13. Mr. Desmond suggests that winning applicants who received credits in the bidding process be required to pay back all or part of the credit in the event that the station is sold within 5 years of commencement of program tests. A reasonable provision would be to forgive 20% of the total value of the credits for each year that the station is held by the winning bidder prior to the sale. This will prevent unjust enrichment.

B. ALLOWING SETTLEMENTS

14. Mr. Desmond suggests that the FCC continue to allow one type of noncash settlement between competing applicants who filed during a filing window. Specifically, Mr. Desmond proposes that in the event that the multiple applications can be accommodated by other available frequencies, the FCC make such accommodation instead of requiring the applicants to go through an auction. This comports with existing Commission practice. See Albion, Nebraska, 10 FCC Rcd 11927 (1995); Copeland,

Kansas, 5 FCC Rcd 7682 (1990).

15. The FCC should make such accommodation in the following cases:

A. The Commission can accommodate with alternative frequencies all competing applicants (i.e., a second frequency is available if two competing applicants exist, a third frequency if there are three applicants, etc.).

B. If insufficient frequencies to accommodate all applicants are available, one applicant may choose to drop out of the bidding and accept the alternate frequency only if the other bidders decline to bid on the alternative frequency.

C. The alternate frequency or frequencies must be of the same or lesser Class than the frequency for which the competing applications were received.

D. The applicant(s) displaced to the alternate frequency or frequencies must voluntarily agree to accept the alternate frequency and resulting technical facilities.

C. ELECTRONIC BIDDING

16. The NPRM raises the question of whether the FCC should require bidders to bid electronically via computer, or also allow bidding by telephone. The Commission should allow both options, in recognition of the fact that many broadcast applicants will likely be small businesses with limited resources. Having to bid electronically could prove unduly burdensome for such applicants. Moreover, the FCC must further open its electronic bidding process by creating electronic versions of FCC Form 175 and bidding software that do not rely solely on the Windows operating system. Initial electronic filings and bids must rely on cross-platform Web-browser, BBS, or other software. This is particularly important to individuals and small business that employ OS/2, Unix, Macintosh, or other operating systems. This is also particularly important in light of the ongoing Antitrust action by the Justice Department against the Microsoft Corporation. It would be irrational for the FCC to reward the Microsoft Corporation by forcing any

and all who want to participate in auctions to purchase and use Microsoft software at the same time that the Department of Justice is pursuing legal process against Microsoft for monopolistic practices.

D. UP-FRONT PAYMENTS

17. Another issue the NPRM raises concerns the amount of required up-front payments by auction participants. Mr. Desmond believes that the up-front payments should be kept reasonable, and should vary based on the population within the protected contour of a station operating with maximum facilities from the reference coordinates for the allotment (for FM and TV). Mr. Desmond proposes that an amount of \$50 (CPI-adjusted annually) per 1,000 people as a reasonable amount.

E. FILING PERIOD

18. The NPRM asks about the appropriate length of time to allow for the winning bidder to file a long-form application for construction permit. The 30 days suggested is insufficient to prepare an application, particularly if no reasonable assurance of site availability is required at the outset. A more reasonable time would be 90 days.

F. APPLICATION SIMPLIFICATIONS

19. The NPRM also suggests eliminating the "reasonable assurance" site certification from the long-form application. Mr. Desmond concurs, but only if the FCC chooses to require the long form application be filed within 30 days of winning the auction. He suggests further that the FCC also eliminate the requirement to list sources of funding. The need to eliminate these provisions from the long-form application would decrease should the FCC allow a longer filing period as paragraph 18 suggests.

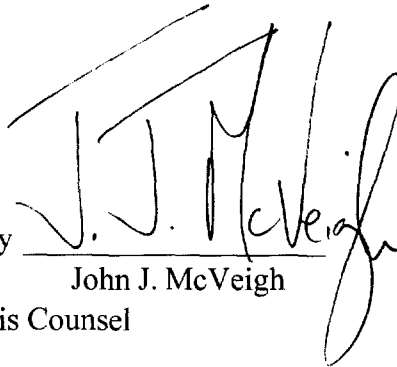
IV. IN CONCLUSION

20. While competitive bidding is generally an efficient tool for allocating spectrum, the FCC must recognize that the law does not require auctions in all cases, and that auctions are not a be-all-and-end-all in and of themselves. Other, nonmonetary factors such as diversification of media ownership and the fair and efficient distribution of spectrum serve the public interest in critical ways. The Agency must make allowances for such nonmonetary factors in implementing its new system for processing broadcast applications. Mr. Desmond has herein proposed means to achieve that result.

Respectfully submitted,

THOMAS DESMOND

By

A handwritten signature in black ink, appearing to read "J. J. McVeigh", written over a horizontal line.

John J. McVeigh

His Counsel

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